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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/641,410

08/18/2000

Alice Mary O'Donnell-Kiely

7256

7590

10/29/2007

Alice O Kiely  
71 Stonewall Court  
Yorktown Heights, NY 10598-1819

EXAMINER

CHAWLA, JYOTI

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

10/29/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No. 09/641,410	Applicant(s) O'DONNELL-KIELY, ALICE MARY	
	Examiner Jyoti Chawla	Art Unit 1794	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 09 September 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 289-318 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 289-318 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>9/10/2007</u> . | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 9, 2007 has been entered. Claims 1-288 have been cancelled and claims 289-318 have been added. Claims 289-318 are pending and examined in the present office action.

**Note:** To expedite prosecution applicant is requested to furnish support for the subject matter recited in the new and amended claims. Furthermore, the applicant is requested to recite the claims such that the rejections made under 35 USC 112 in the previous office actions are corrected.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 289-318 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 289-318 are indefinite for the recitation of the term, "composite". Claim 290 recites, "The support for a frozen comestible of claim 290 wherein said edible composite comprises an edible composite material." Claim 291 recites, "The support for a frozen comestible of claim 290 wherein said edible composite material comprises two ingredient materials." A composite is defined as "made of separate elements", i.e. made of more than one element, i.e. comprising a minimum of two ingredient materials.

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Thus, either claim 291 does not further limit claim 290 or applicant has chosen to redefine a known term. Where applicant acts as his or her own lexicographer to specifically define a term of a claim contrary to its ordinary meaning, the written description must clearly redefine the claim term and set forth the uncommon definition so as to put one reasonably skilled in the art on notice that the applicant intended to so redefine that claim term. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999).

Claim 301 is indefinite for the recitation of "moisture proof barrier coating" as it is unclear as to what standards of moisture proofing are being employed to assess the adequacy of coating on the edible support for the frozen confection.

Claims 293, 304, 309, 316 are indefinite for the recitation of "edible composite material comprises two ingredient materials each comprise " as it is unclear whether the edible composite material comprises two of the ingredients listed or if the two ingredients in the composite are composites themselves comprised of the listed ingredients.

### ***Double Patenting***

#### ***Statutory Provisional Double Patenting***

The rejection made in the previous office action has been withdrawn in light of applicant's amendments.

#### ***Nonstatutory Provisional Double Patenting***

The nonstatutory double patenting rejection over claims 21-29, 31-40, of copending Application No. 10/167812 has been withdrawn in light of applicant's amendments.

### ***Claim Rejections - 35 USC § 102***

Claims 289-318 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

The references and rejection are incorporated herein and as cited in the previous office actions.

Musher teaches ice cream (frozen comestible) on an edible support structure made of stick, which can be either edible or inedible, as instantly claimed. The edible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). Thus Musher teaches of a frozen comestible, and a composite material with one or more ingredients, for supporting the frozen comestible. The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), and the lollipop and structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (fluid ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2 lines Page 5: Column 1, lines 65 to Column 2, line 2). Musher also teaches that the finished product or the composite formed support can be coated with chocolate or sprinkled with other flavoring material, i.e., enrobed or dipped ingredient which is fluid (Page 3: Column 2, lines 25-30) to make the edible support moisture proof as instantly claimed.

The composite support as taught by Musher has at least two discernable (i.e. perceptible) edible materials or components or members (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), wherein one portion extends into the ice cream and the other portion extends out of the ice cream for holding the frozen confection vertically (i.e., Musher teaches of a vertically orientated utilitarian support) (See figures 1-6) as instantly claimed. Furthermore, Musher teaches a plurality of voids in the overall structure (i.e. note the spaces in Figure 6 between the structure pieces and lollipop (Page 2: Column 2, lines 20-25; Page 3:

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Column 1 line 70-Column 2 line 5). Also see Page 6: Column 1, lines 4-70; Page 2, Column 2, line 4 to Page 3, Column 1, line 60 and figures 1-6.

The composite support as taught by Musher has plurality of individual ingredients, which can be discernible (i.e. perceptible), such as the cereal flakes, candy flakes, ribbons, grains etc., (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23). Musher further teaches the support structure for the frozen confection which includes an edible stick or lollipop, where the composite support made by attaching the stick (which may be completely edible) to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47), as recited in claims 243 and 258. The discernible ingredients taught in the support structure as taught by Musher comprise a discernible difference, e.g., flakes and hardened candy pieces provide two different taste and texture as instantly claimed. Musher further teaches that the structure pieces around the lollipop, which include candy, can be placed concentrically (i.e. a circle around the lollipop) or maneuvered in some other manner on the support to improve the strength of the support, (page 5: Column 1, lines 45-54 and Column 2, lines 24-35), i.e., musher teaches of supported frozen comestible having means for inhibiting the breakage.

### ***Response to Arguments***

Applicant's arguments dated September 9, 2007 have been fully considered, but they are not persuasive and the rejections are maintained for the reasons of record.

Regarding applicant's request to rejoin applications, the applicant is informed that the office does not rejoin applications. The office however, does rejoin non-elected claims that have not been cancelled in a single application, where the generic or linking claim has been found to be patentable. Since the present application does not qualify under the above category, applicant's argument is not persuasive.

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**Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Jyoti Chawla  
Examiner  
Art Unit 1794



**KEITH HENDRICKS**  
**PRIMARY EXAMINER**